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Supreme Court of the United States

OCTOBER TERM, 1942

No. 833.

HAZEL E. CRANSTON, *Petitioner,*
vs.
RANSFORD C. THOMPSON and FRANK B. THOMPSON and MARTHA A. BROWN.

No. 834.

HAZEL E. CRANSTON, *Petitioner,*
vs.
RANSFORD C. THOMPSON, FRANK B. THOMPSON, and RANSFORD C. THOMPSON, as Executor of the Last Will and Testament of Sarah A. Thompson, Deceased.

BRIEF OF RESPONDENTS, RANSFORD C. THOMPSON AND FRANK B. THOMPSON, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

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Summary Statement of Matter Involved.

These cases, brought in the United States District Court for the Western District of New York, are negligence ac-

tions resulting from the collision of two automobiles (R. 3; 25). The defendant, claiming the right to do so as third party plaintiff, under Rule 14-a of the Federal Rules of Civil Procedure, secured orders bringing in as third party defendants the respondents, Ransford C. Thompson and Frank B. Thompson, the owner and operator of the other car involved (R. 10; 31). Pursuant to these orders third party complaints were served (R. 13; 34).

On motion of the third party defendants, respondents Ransford C. Thompson and Frank B. Thompson herein, the District Court vacated the orders bringing in the third party defendants and dismissed the third party complaints (R. 22; 36). This relief was accorded to the third party defendants, Ransford C. Thompson and Frank B. Thompson, because under the substantive law of New York State there is no right of contribution among joint tort feasors except where the plaintiff brings his action against two or more defendants and a judgment is obtained against such defendants as joint tort feasors.

The District Court further held that under the Law of New York there could be no recovery against the third party defendants unless the plaintiffs amended their complaints and further that the plaintiffs could not amend their complaints to allege causes of action against the third party defendants because the plaintiffs and both the third party defendants are citizens of the State of Pennsylvania (R. 3, 18, 19, 25).

The determination of the District Court was affirmed by the Circuit Court of Appeals for the Second Circuit.

Opinions Below.

The opinion of the District Court, is reported in 2 Federal Rules Decisions 270 (R. 39). The opinion of the Circuit Court of Appeals is reported in 132 F (2d) 631 (R. 54).

Jurisdiction.

It is respectfully submitted by the respondents, Ransford C. Thompson and Frank B. Thompson, that no special or important reasons exist for the granting of a writ of certiorari.

The Circuit Court of Appeals has not rendered a decision in conflict with the decision of another Circuit Court of Appeals in the same matter.

General Talking Pictures Corporation v. Western Electric Co., 304 U. S. 175

The Circuit Court of Appeals has not decided a question of local law in a way in conflict with applicable local decisions. The decision of that Court is in conformity with the substansive law of the State of New York that there is no contribution among joint tort feasors.

The petition simply presents a question of state law. *Richlin v. New York Life Ins. Co.* 304 U. S. 202, 206:

> "As to questions controlled by state law, however, conflict among circuits is not of itself a reason for granting a writ of certiorari."
>
> * * * * *
>
> "We decline to decide the issue of state law."

Even if this Court were to grant a writ of certiorari because of lack of uniformity in District Court decisions,

there is, as we shall hereinafter point out, no such lack of uniformity.

Points of Law Discussed.

It is the position of the respondents that they cannot be properly joined as third party defendants in these actions for the following reasons:

A. If the plaintiffs do not amend their complaints, there can be no recovery against the third party defendants, since the right of contribution among joint tort feasors does not exist under the Laws of New York State.

B. The plaintiffs cannot amend to allege causes of action against the third party defendants because the plaintiffs and both the third party defendants are citizens of the same state.

ARGUMENT.

A.

In bringing in the third party defendants, the defendant and third party plaintiff relied on Rule 14-a of the Federal Rules of Civil Procedure. This is, of course, a rule of procedure only and does not change the substantive law of the State of New York which does not permit contribution among joint tort feasors except where a judgment has been obtained against two or more joint tort feasors.

Fox v. Western New York Motor Lines, Inc., 257 N. Y. 305.

Section 211-a of the Civil Practice Act, (Page 14 of Petition).

It is only in the case of primary and secondary liability that the defendants may bring in an additional defendant.

Section 193 of the Civil Practice Act, (Page 13 of Petition).

It is clear that the question of contribution among joint tort feasors is not a matter of procedure but of substantive law.

Bohn v. American Export Lines, Inc., 42 Fed. Supp. 228, 229 (D. C. S. D. of New York, 1941):

"Since Erie R. Co. v. Tompkins, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, 114 A. L. R. 1487, the state law is determinative of the right to indemnity or contribution. Kravas v. Great Atlantic & Pacific Tea Co., D. C., 28 F. Supp. 66. As to matters of pleading the Federal Rules control."

Unless amended complaints are served by the plaintiffs against the third party defendants, it is clear that no recovery could be had against the third party defendants and the District Court properly vacated the order directing the inclusion of the third party defendants and dismissed the third party complaints.

Malkin v. Arundel Corporation (D. C. of Md., 1941), 36 Fed. Supp. 948.

In that case the motion to rescind the order for the third party complaint was granted conditionally, the order providing that unless within ten days after service of notice on plaintiff or his counsel, the plaintiff amends his complaint to assert a joint claim against the third party defendant and the original defendants. In the case at bar, the motion was absolutely and not conditionally granted by the District Court because of the fact that the plaintiffs

cannot so amend their complaints as established by the authorities set forth in Point II of this brief.

Holtzoff, New Federal Procedure, Sec. 5, Pg. 48:

"If the third-party defendant is not liable over to the original defendant but is only directly liable to the original plaintiff, it becomes necessary for the original plaintiff to amend his complaint after the third party is brought in so as to assert his claim against such third party."

Sklar v. Hayes, 1 Federal Rules Decisions (D. C., E. D. Pennsylvania, 1941) 594.

Satink v. Holland, 31 Fed. Supp. 229 (D. C., D. New Jersey, 1940).

Crim v. Lumbermen's Mut. Casualty Co., 26 Fed. Supp. 715, (D. C. of Dist. of Columbia, 1939).

Whitmire v. Partin, 2 Federal Rules Decisions, 83, (D. C., E. D. Tenn., 1941).

General Taxicab Assn. v. O'Shea (U. S. Ct. of Appeals, Dist. of Columbia, 1940) 109 Fed. Rep. (2d) 671.

Rule 14 is an adoption of Admiralty Rule No. 56. Under Admiralty Rule 56, it has always been held that claimant could not proceed against an impleaded party unless he amended his petition.

Jensen v. Bank Line, 26 Fed. Rep. (2d) 173 Circuit Court of Appeals, 9th Circuit—1928).

Burns Bros. v. City of New York, 22 Fed. Supp. 55 (D. C., S. D. New York, 1938).

The Federal Rules of Civil Procedure relate only to procedure and a right of contribution cannot be created by these rules. As to joint tort feasors, Rule 14 is effective only in those states where there is contribution among joint tort feasors.

Washington Institute on Federal Rules (American Bar Association) Pg. 62.

New York Symposium on Federal Rules (American Bar Association) Pg. 296.

B.

Those cases in which a defendant as third party plaintiff has been allowed to bring in a third party defendant, may be classified as follows: (1) Decisions in States in which contribution among joint tort feasors is allowed. (2) Claims of indemnity over against the third party defendant by the third party plaintiff. Such claims, of course, are recognized in New York State where the defendant seeks to bring in one who is primarily liable.

These cases do not present the situation here involved where under the Law of New York State there is no contribution among joint tort feasors, and where the court does not have jurisdiction of a claim by the plaintiffs against the third party defendants because the necessary diversity of citizenship is lacking.

Federal Rules of Civil Procedure, Rule 82:

"These rules shall not be construed to extend or limit the jurisdiction of the District Courts of the United States or the venue of actions therein."

Hoskie v. Prudential Ins. Co. of America, 39 Fed. Supp. 305, (D. C., E. D. of New York, 1941).

Johnson v. G. J. Sherrard Co. & New England Tel. & Tel. Co., 2 F. R. D. 164 (1941).

Herrington v. Jones, 2 F. R. D. 108 (D. C., E. D. of Louisiana, 1941).

Osthaus v. Button, 70 Fed. Rep. (2d) 392 (Circuit Court of Appeals 3d Circuit, 1934).

New York Symposium on Federal Rules, Pg. 296 *(Supra).*

It is clear from the authorities that while a defendant may bring in another party who is or may be liable to the plaintiff or to the defendant, that Rule 14 is a rule of procedure and does not change the substantive law, and cannot be invoked so as to permit a defendant to bring in a third party defendant and thereby secure a joint judgment against the defendant and the third party defendant. This cannot be done because of the simple fact that there is no contribution among joint tort feasors in New York except after the entry of a judgment. It is well established by the authorities that a judgment cannot be secured in favor of the plaintiff against a third party defendant unless the plaintiff's complaint is amended. In the case at bar, the plaintiff cannot amend his complaint because the court would thereby be deprived of the jurisdiction because the plaintiff and third party defendants are all citizens of the State of Pennsylvania.

Ikeler v. Detroit Trust Co., 30 Fed. Supp. 643 (Dist. Ct., E. D. of Michigan, 1939), (Aff'd. 116 Fed. 807).

Morrell v. United Air Lines Transport Corp., 29 Fed. Supp. 757 (D. C., S. D. New York, 1939), 759:

"But if the scope of ancillary jurisdiction has been correctly construed, Rule 14 does not extend any jurisdiction but merely sets up the procedural machinery for the exercise of a jurisdiction which the court has always had."

As the Court pointed out in General Taxicab Assn. v. O'Shea, 109 Fed. Rep. (2d) 671 *(supra)*, Rule 14 was adopted for the purpose of extending with some modifications, into the civil procedure of the District Courts, the practice with respect to impleading of third parties of Federal Admiralty Courts and certain State Courts, including New

York. The only procedure in New York is under Section 193 of the Civil Practice Act, which permits a defendant to implead a third party against which the defendant has a claim on the theory of primary and secondary liability. In the case at bar, since Rule 14 does not change the substantive law and since the plaintiff cannot amend his complaint because of lack of diversity of citizenship, there can be no purpose in continuing the third party defendants in the action.

It is clearly pointed out in Johnson v. G. J. Sherrard Co. & New England Tel. & Tel. Co. *(supra)* 2 F. R. D. 164, while there are a number of decisions holding that in ancillary proceedings jurisdictional requirements may be disregarded, as the Court pointed out in that case, the applicability of these cases depends upon whether the third party practice may be termed an ancillary proceeding incident to the main suit, or whether it may properly be regarded as a separate and independent suit. A claim over by defendant against a third party on the basis of indemnity would, of course, be an ancillary proceeding, but in the case at bar a recovery by the plaintiff against a third party defendant would not be ancillary but would involve the main suit.

The cases cited in the petition either involve (1) the substantive law of states where contribution among joint tort feasors is allowed, or (2) involve an ancillary petition, or (3) involve primary and secondary liability.

Gray v. Hartford Accident & Indemnity Co., 31 Fed. Supp. 299.

Gray v. Hartford Accident & Indemnity Co., 32 Fed. Supp. 335.

Bossard v. McGwinn, 27 Fed. Supp. 412.

Kravas v. Great A & P Co., 28 Fed. Supp. 66.

Crim v. Appalachian Electric Power Co., 29 Fed. Supp. 90.

Williams v. Keyes, 125 Fed. (2d) 208.

Morrell v. United Air Lines Transport Corp., 29 Fed. Supp. 757 *(supra)*.

Sklar v. Hayes, 1 R. F. D. 594 *(supra)*.

The Pennsylvania law permits joint tort feasors to be brought in and a third party claim, therefore, is ancillary. This case was referred to in a later decision by the District Court of Pennsylvania.

Delano v. Ives, 40 Fed. Supp. 672, 673:

"But the weight of authority is to the effect that a defendant cannot compel the plaintiff, who has sued him, to sue also a third party whom he does not wish to sue, by tendering in a third party complaint the third party as an additional defendant directly liable to the plaintiff. See Satink v. Township of Holland (Lehigh Valley R. Co.), D. C., N. J., February 7, 1940, 31 F. Supp. 229. In Sklar v. Hayes (Singer v. Hayes), 1 F. R. D. 593, Judge Bard of this Court allowed the third party complaint, but only after sustaining the plaintiff's amendment charging direct liability against the third party defendant."

Lensch v Bouschell Carrier Co., 1 F. R. D. 200.

It does not appear what was involved in that case, and, in any event, the question of jurisdiction does not seem to be involved.

Wichita Railroad & Light Co. v. Public Utilities Commission of the State of Kansas, 260 U. S. 48:

This involves a question of public utility rates. This case, decided in 1922 before the promulgation of the new federal rules, had to do with the question of public utility rates and involves the bringing in of another party neces-

sary to the determination of the question. This case involves an entirely different proposition than the case at bar, where a recovery by the plaintiffs against the third party defendants would not be ancillary to the main suit but would be the main suit itself.

In the case at bar it appears that if the plaintiff so desired, the action could have been started in the State Court against the defendant Cranston as a resident of this state, and also against the third party defendants. The action could not have thus been commenced in the District Court for the Western District of New York because of lack of diversity of citizenship and the defendant should not be permitted to indirectly accomplish what could not be directly accomplished in the first place, particularly since in the death action the plaintiff as Executor would be suing himself individually.

CONCLUSION.

The petition for Writ of Certiorari should be denied.

Respectfully submitted,

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